

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

PATRICIA AIELLO *et al.*,
Plaintiffs, Individually, and As Assignees
of Claims Owned by Kube, LLC,

v.

INVISION MARKETING SOLUTIONS,
a division of SOUTHERN WINE &
SPIRITS OF AMERICA, INC., and
successor entity SOUTHERN [sic]
GLAZER'S WINE AND SPIRITS OF
ILLINOIS, LLC, An Illinois corporation,

Defendants.

Case No.: 1:17-cv-00985

Judge Leinenweber

**DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED
COMPLAINT AND TO STRIKE PARAGRAPH 128**

Defendant Southern Glazer's Wine and Spirits of Illinois, LLC ("defendant" or "Southern Glazer") moves to dismiss the Third Amended Complaint ("Complaint") with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6) and to strike Paragraph 128 of the Complaint pursuant to Federal Rule of Civil Procedure 12(f) (the "Motion"). In support of its Motion, Southern Glazer states as follows:

1. This is an action for unpaid wages brought pursuant to the Fair Labor Standards Act ("FLSA") and the Illinois Minimum Wage and Payment Collection Act ("IWPCA"), as well as claims for unjust enrichment and indemnification pursuant to an assignment.

2. Plaintiffs fail to state a claim under Count I (FLSA) and Count II (IWPCA) because these claims can only be maintained against plaintiffs' employer, and the Complaint fails to allege sufficient facts under *Iqbal* or *Twombly* to show that Invision Marketing Solutions

(“Invision”), Southern Wine & Spirits of America, Inc. (“SWSA”),¹ or Southern Glazer was ever plaintiffs’ employer, joint or otherwise.

3. Count III is a claim for unjust enrichment and should be dismissed with prejudice because unjust enrichment claims are preempted by the FLSA and because the Complaint fails to allege sufficient facts to show that SWSA/Invision was unjustly enriched.

4. Count IV is a claim for indemnity based on former defendant Kube, LLC’s (“Kube”) purported assignment to plaintiffs of its rights under an Events Staffing Agreement (“Agreement”) with SWSA/Invision. Count IV should be dismissed with prejudice because the Agreement expressly precludes unilateral assignment of rights without the counterparty’s written consent, which did not occur here.

5. To the extent plaintiffs allege in the alternative that SWSA/Invision is vicariously liable for the acts of its “agent” (Kube), the Illinois Supreme Court has held that the plaintiffs’ settlement with the agent (Kube) extinguishes the liability of the principal (SWSA/Invision), even if the settlement agreement attempts to reserve plaintiffs’ right to seek recovery from the principal, as here. Accordingly, plaintiffs’ settlement with the agent (Kube) extinguishes any purported vicarious liability of the principal (SWSA/Invision).

6. Paragraph 128 of the Complaint also makes the following conclusory assertion: “Plaintiffs bring this claim as an opt-in collective action seeking back pay, costs, and reasonable attorneys’ fees in redress for Defendants’ wage theft.” (ECF No. 73 at ¶128.) This Paragraph must be stricken pursuant to Rule 12(f) because it improperly purports to convert the FLSA claim into an “opt-in collective action” and is simply insufficient to plead a collective action.

¹ Invision is a now-defunct division of SWSA (collectively, “SWSA/Invision”). The Complaint alleges that Southern Glazer is the “successor entity” to SWSA/Invision. (ECF No. 73 at ¶¶ 1, 5.)

WHEREFORE, Defendant Southern Glazer's Wine and Spirits of Illinois, LLC respectfully requests that the Court dismiss the Third Amended Complaint with prejudice pursuant to Rule 12(b)(6), strike Paragraph 128 pursuant to Rule 12(f), and grant all such further relief that this Court deems just.

Dated: December 21, 2018

Respectfully submitted,

By: /s/ Anne E. Larson and Goli Rahimi
One of the Attorneys for Defendant,
**SOUTHERN GLAZER'S WINE AND
SPIRITS OF ILLINOIS, LLC**

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on December 21, 2018, she filed the foregoing *Defendant's Motion to Dismiss Plaintiffs' Third Amended Complaint and to Strike Paragraph 128* electronically with the Clerk of Court using the ECF system, which sent notification of such filing to the following:

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